SUPREME COURT, U. S.

JUL 26 1967

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IN THE

Supreme Court of the United States

October Term, 1967

No. 422

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian *ad Litem*,

Petitioner,

against

STUART M. GOLDSMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

CLIFTON F. WEIDLICH,
Attorney for Petitioner,
55 Liberty Street,
New York, N. Y. 10005.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above-entitled action on February 28th, 1967.

Opinions Below

The order and *per curiam* opinion of the Appellate Division are printed as Appendices A and B hereto. The *per curiam* opinion is reported in 25 A. D. 2d 515 and 266 N. Y. S. 2d 1021. The Court of Appeals rendered no opinion. The opinion of the Supreme Court, New York County, at Special Term, was not reported and appears in the Record, pages 7-8. The amended remittitur of the Court of Appeals is printed as Appendix C.

Jurisdiction

The judgment of affirmance by the Court of Appeals, sought to be reviewed, was entered on February 28, 1967.

Jurisdiction of the Court is invoked under 28 U. S. C. 1257(3) and 2101. On May 15, 1967 Mr. Justice Harlan extended the time for filing the petition for certiorari to July 28, 1967.

Questions Presented

1. Whether the full faith and credit clause, as expounded in *Johnson* v. *Muelberger* (340 U. S. 581), precludes the infant petitioner from attacking (*as to him*) the void foreign decree of his parents, collusively and fraudulently procured by them in a sister state (Georgia) before the birth of petitioner in New York State, he being a potential ward of New York, where the parents are and were domiciled at all times after marriage.

2. Whether dismissal of petitioner's cause as on demurrer and before trial violated the due process or equal protection clause of the Fourteenth Amendment by precluding him from attack in such circumstances as give him standing to assail the void divorce decree under the settled law of the forum, New York State.

3. Whether recognition by the New York courts of a consensual divorce, decreed by the Superior Court of Georgia and admittedly procured by the parties' collusion and fraud perpetrated on that court, is in violation of the full faith and credit and privileges and immunities provisions of Article IV, Sections 1 and 2, as well as of the Fourteenth Amendment.

4. Whether the courts below contravened Article IV of the U. S. Constitution, either as to Section 1 or Section 2, and extended more faith and credit in New York to the Georgia divorce record and decree than would be accorded by the State of Georgia.

Statutes Involved

This petition involves Article IV, Sections 1 and 2 of the United States Constitution, and the due process and equal protection of laws provisions of the Fourteenth Amendment thereto and 28 U. S. C. Section 1738, 62 Stat. 947.

State statutes involved are N. Y. Civil Practice Law & Rules 3211(a), subd. 1 and 7, and General Obligations Law, 5-311 and Sections 110-701, 110-706, 110-709 and 30-107 of the Code of Georgia, 1933, as amended. All statutes are printed in pertinent part as Appendix D.

Statement of the Case

Petitioner sues by guardian *ad litem* for declaratory relief, alleging that a colorable decree of total divorce was collusively procured in May, 1952 by defendants, his parents, in the Superior Court of the State of Georgia; that respondent Stuart M. Goldsmith and his co-defendant, Florence D. Goldsmith, had married in 1947 in New York City, lived together there until April 1952, when the latter went to the State of Georgia, spent several hours there and returned to her home in New York the same day; that after such return, despite the purported divorce, the parties resumed marital relations and on March 6th, 1954, petitioner was born in New York in consequence of that relationship (R. 10-12).

The complaint further states that such foreign decree was void in that a fraud was perpetrated on the divorce court with respect to the requirement of six months actual residence in Georgia before commencement of the action there; that the judgment rendered is subject to impeachment as a nullity under the law of that state, the Superior Court lacking jurisdiction over the subject matter and the parties, both of whom were then and still are domiciliaries of the State of New York (R. 12-14).

Petitioner seeks adjudication declaring that the foreign decree is void *as to him* and that he is the lawfully born child of defendants (R. 14-15).

Before answer respondent moved for accelerated judgment at Special Term and to dismiss the action pursuant to CPLR 3211(a) subd. 1 and 7. The grounds of the motion were that a defense existed founded upon documentary evidence and that the cause of action was insufficient as a matter of law (R. 19-20).

The Supreme Court, Special Term, denied the motion, holding that a pleading challenged for insufficiency should be construed liberally and allegations of fact taken as true. It ruled that the documentary evidence submitted, consisting of the Georgia court record neither related to nor could disprove petitioner's paternity by respondent happening almost two years after the latter's divorce case closed (R. 6-8).

In his opinion Mr. Justice Helman also overruled respondent's contention that declaratory judgment was not the proper relief:

> "Declaratory actions have been frequently used to clarify family relationships and to determine legitimacy" (R. 7).

Respondent appealed to the Appellate Division, First Department, which reversed on the law the order appealed from, granted the motion and directed entry of judgment of dismissal, with costs in both courts.

The Appellate Division opinion relies solely on *Johnson* v. *Muelberger* (340 U. S. 581), and largely on *Phillips* v. *Phillips,* 15 Misc. 2d 884, in concluding that full faith and credit and the law of collateral attack in Georgia precluded attack in New York by petitioner. *Muelberger* dealt with collateral attack by a daughter of a deceased parent, which involved Florida law, the rendering state. Significantly, the Supreme Court of the United States in *Muelberger* pointed out as to the *standing* of the daughter to launch an attack in the Surrogate's Court of New York, that she possessed a "mere expectancy" of inheritance at the time of entry of her father's divorce decree (340 U. S. at 588). The Court in commenting on the expectancy of the daughter's inheritance considered applicable the estate law of New York, not that of Florida, where the divorce was obtained.

The *Phillips* case, decided in the Supreme Court of New York, New York County, construed the Georgia law of collateral attack against a second husband who sought to avoid further support of his wife.

The question of the standing of a person to make collateral attack is entirely distinct from, and not to be confused with, the secondary issue confronting him, viz., the merits of the grounds for attack and the proof thereof (*Tippin* v. *Tippin,* 148 Conn. 1, 6). Both the Appellate Division and the N. Y. Supreme Court in *Phillips* failed to distinguish between these two essentially distinct issues.

This distinction, however, was observed in *Vanderbilt* (354 U. S. 416), holding that the wife's domicil, the forum

state of New York, could award her support after an *ex parte* foreign divorce obtained by Mr. Vanderbilt. Mr. Justice Harlan, concurring in *Simons* v. *Miami First National Bank* (381 U. S. 81 at 87 n.), referred to the application of the law of the forum as follows:

> "If Mr. Vanderbilt owned property in New York at the time of the *ex parte* divorce, New York might arguably be free to hold that ownership of New York property carries with it the obligation to support one's wife, at least to the extent of the value of that property."

Moreover, the reasoning of the Appellate Division avoids any and all consideration of the traditional theory of *in rem* jurisdiction to grant divorce. Except for participating parties and those in privity with them * * *

> "the very essence of in rem jurisdiction * * * is the actual situs of the res within the court's jurisdiction, and this is lacking in the absence of *bona fide* domicile." (Ehrenzweig, Conflict of Laws, 252; 1962)

Here the domicil of both parties to the Georgia divorce is New York, the matrimonial domicil, and never in Georgia (R. 10-12). The party-plaintiff sojourned at Augusta several hours on April 24th, 1952, and returned by train to New York the same day. She did not even register at a hotel in Augusta, saw the lawyer there, signed some papers and used the round trip railroad ticket given her by her husband's New York counsel (R. 107, 108, 40-41). At most the proceedings amounted to "the form of divorce gone through". The purported decree of divorce merely found that the court possessed personal jurisdiction over the parties (R. 51).

That Georgia does not permit divorce by consent was also overlooked below:

> "One filing a petition for divorce must allege and prove that he has been a *bona fide* resident of the State for the length of time required by law. The burden of proof is upon the applicant. *Jurisdiction of the subject matter cannot be conferred by consent.*" (Emphasis ours). (*Dicks* v. *Dicks*, 177 Ga. 379, 382).

Furthermore, neither petitioner nor either parent has the slightest contact with the foreign rendering state. His standing to attack the invalid decree is determinable by the law of the forum as in *Simons, May, Estin, Vanderbilt* and *Muelberger.*

The Appellate Division adverted to none of the constitutional objections raised by petitioner under the due process or equal protection of laws clauses of the Fourteenth Amendment. These federal questions were raised before the Appellate Division and in the opposing affidavit of petitioner's guardian submitted in the court of first instance (R. 135-136).

The Appellate Division placed its *imprimatur* on consensual divorce in the sister state of Georgia, saying that "there is no requirement under Georgia law that the (divorce) petitioner's residence be pleaded or established in any particular form". The *dictum* conflicts not only with the public policy of Georgia, as pronounced by its Supreme Court in *Dicks* (177 Ga. 379) and other cases, but with the long established public policy of New York. In New York spouses are prohibited from contracting *inter sese* to dissolve their marriage (N. Y. Gen. Obligations Law §5-311). Extending such misconstruction of Georgia law into New York and against a citizen thereof constitutes

discrimination against petitioner's rights under the United States Constitution, Art. IV, Section 2. Petitioner is entitled to the same, not less, protection than New York's own public policy against consensual divorce affords him. See *Vanderbilt* v. *Vanderbilt* (1 N. Y. 2d 342, 352; 153 N. Y. S. 2d 1, 9).

Innocent interested third parties are permitted to attack collaterally void foreign divorces, *in rem* jurisdiction lacking, under both the law of New York and Georgia.

In re Lindgren's Estate, 293 N. Y. 18, 55 N. E. 2d 849 (1944);
Urquhart v. *Urquhart,* 272 App. Div. 60, aff'd 297 N. Y. 689, 77 N. E. 2d 1 (1947);
Cole v. *Cole,* 221 Ga. 171, 143 S. E. 2d 637 (1965).

In the *Cole* case the foreign divorce record showed that plaintiff's first husband had alleged residence requisite for divorce and his wife had appeared and admitted it. The fact that personal jurisdiction existed over both parties to the prior divorce suit was immaterial; absent subject matter jurisdiction. On the other hand, in the case at bar no evidence of domicil in Georgia was even offered; the jurisdictional issue was not pleaded, admitted, offered in evidence or found (R. 37-39; 43-44, 47-48, 51).

Possible *vacatur* of the decree by reason of perjury (Ga. Code, Section 110-706) was avoided by the artifice of the parties (Mr. and Mrs. Goldsmith) not swearing to or admitting under oath to any residence of the wife in Georgia. Instead the unsworn introduction or preamble to the divorce petition "set out" that Mrs. Goldsmith as plaintiff was "a resident of Richmond County, Georgia, for more than six months" (R. 37-38). Her deposition

of five answers to five questions was devoid of reference to her residence anywhere (R. 47-48).

Petitioner's appeal to the Court of Appeals resulted in affirmance without costs in that court. No opinion was rendered by the Court of Appeals. Therefore, the views of the Court below were not necessarily adopted or approved (*Buehler* v. *Rensselaer County*, 260 N. Y. 268, 183 N. E. 384).

In addition to the objection to the violation of petitioner's rights under the due process and equal protection of laws clauses of the XIV Amendment, petitioner in the Court of Appeals contended that the reversal and dismissal by the Appellate Division violated the full faith and privileges and immunity clauses of the United States Constitution, Art. IV, Sections 1 and 2. On the proposition that this Article prohibits a state court giving greater effect in the forum than is accorded by the rendering sister state, cases from *Mills* v. *Duryee*, 7 *Cranch* 481 (1813) to *Simons* (1965) were cited.

Attention is called to the fraud on the Georgia Superior Court. No sworn allegation of Mrs. Goldsmith's residence in or out of the State of Georgia was set forth in her petition for divorce. Instead the introductory sentence, or preamble, to the petition for divorce described her as "a resident of Richmond County, Georgia, for more than six months prior to the filing of this petition" (R. 37). Following were five numbered paragraphs and she swore only to the truth and correctness of the "consecutively numbered" allegations (R. 38). Respondent's purported answer, appearing in his own person, neither admits nor denies the unsworn assertion of Mrs. Goldsmith's residence (R. 43). The only evidence in the case, submitted in the form of a post-dated deposition, contains no refer-

ence to the divorcing plaintiff's residence. The entire deposition reads:

> "Q. What is your name? A. My name is Florence A. Goldsmith.
>
> Q. Are the allegations set forth in your petition, consecutively numbered, true and correct? A. Yes.
>
> Q. When were you and the defendant married and upon what date did you separate? A. We were married on February 15, 1947 and separated on or about April 16, 1952.
>
> Q. What was the cause of said separation? A. The cause of said separation was mental cruel treatment, wilfully inflicted upon me by my husband, which consisted of fussing and nagging on his part.
>
> Q. Are you asking for a total divorce? A. Yes (R. 47-48)."

The foregoing was purportedly sworn to in Georgia on May 1st, 1952, at which time Mrs. Goldsmith was back in New York. She spent several hours only on April 24th, 1952 in Augusta, Georgia (R. 107-108). There she went to the office of her attorney, retained for her by Mr. Goldsmith's New York attorney, and signed some papers (R. 108).

Another piece of deception was the use of the legal back for enclosure of Mr. Goldsmith's answer subscribed in his own person (R. 43-45). Below no explanation of the effect under Georgia law of the dual form of appearance, if it be that, was advanced. Undoubtedly its purpose was to mislead the Superior Court into the belief that both parties to the case were represented by local counsel. But no evidence thereof was adduced. Whether or not Mr. Mixon was authorized to appear for respondent is nowhere revealed. Finally, on this point the decree of divorce

omits any reference to the required jurisdictional residence of six months (R. 51).

As stated at page 16 hereof the Georgia divorce court record is not exemplified and is otherwise defective, not having been certified in accordance with Title 28, Section 1738, U. S. Code. The defective, meaningless form of certification, appended to the papers, is that

> "the above is a true copy from the minutes of said court."

Reasons for Granting the Writ

Petitioner's primary argument is that the court below erred in relying upon *Johnson* v. *Muelberger*, 340 U. S. 581 rvg. 301 N. Y. 13 (1951) *sub nom In re Johnson's Estate.* The more pertinent question, evidently not yet reached by this Court, is whether respondent is in a position to claim collateral protection and full faith and credit for the Georgia decree of divorce, collusively procured by him by the deceit perpetrated on the foreign divorce court as to the domicil of one party thereto (14 L. Ed. 2d 922, n. 18).

In *Cook* v. *Cook*, 342 U. S. 126, 129 (1951) Mr. Justice Douglas spoke for this Court:

> "We also reserve the question * * * whether respondent [second husband] would now be in a position to attack the Florida decree collaterally if it were found to be collusive and he participated in the fraud."

It was established in migratory divorce many years before *Sherrer* v. *Sherrer*, 334 U. S. 343 (1945), that inquiry into subject matter jurisdiction was not foreclosed by the full faith and credit clause of the United States

Constitution. Such judgments, procured by fraud on the court, were impeachable collaterally by parol evidence.

Kerr v. *Kerr*, 41 N. Y. 272 (1869).

Sherrer holds that full faith on grounds of *res judicata* must be accorded the sister state decree when challenged later in the home state by a *spouse* who had appeared or was subject to personal jurisdiction (334 U. S. 343). One salutary effect was to preserve the validity of either party's subsequent remarriage. Here, of course, that problem does not arise, neither of petitioner's parents having legally remarried anyone. The decision is a sensible application of full faith where the doctrine of *res judicata* is operative.

In the *Kerr* case the contest was between two women over the right to administer the claimed deceased husband's estate. Decedent had procured a divorce in Indiana from one of them, but the proof showed that he, a New Yorker, had not maintained the requisite one year's *bona fide* residence in Indiana. Similar to respondent's pretended and fraudulent appearance in the case at bar, the wife's appearance and answer by local attorneys in the divorce suit was unauthorized.

Holding that the full faith and credit clause did not preclude inquiry into the exercise of jurisdiction over the subject matter or the parties by the rendering state court, nor inquiry into whether "the judgment was founded upon or impeachable for fraud", the court's opinion *per* James, J. said:

> "It was insisted that a foreign judgment could not be inquired into collaterally, or impeached by parol evidence. But the judgment of a court of a sister State has no binding effect in this State unless

> the court had jurisdiction of the subject matter and of the persons of the parties. Want of jurisdiction is a matter which may always be interposed against a judgment when * * * any benefit is claimed for it; the want of jurisdiction, either of the subject matter or of the person of either party renders a judgment a mere nullity" (41 N. Y. at 275).

The concurrent opinion of Grover, J. in the same case stated:

> "Although it appeared from the (divorce) record that attorneys appeared for the respondent in the suit, yet it was proved by the respondent that she never authorized them to appear and had no knowledge thereof. That such appearance was not only a fraud upon the respondent, but also upon the court in Indiana, and the laws of that State."

The rule was recently reiterated by the N. Y. Court of Appeals in *Parker* v. *Hoefer*, 2 N. Y. 2d 612, 162 N. Y. S. 2d 13 (1957):

> "a judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata in the absence of fraud or collusion* * * *." (Emphasis supplied.) (2 N. Y. 2d at 616.)

Plaintiff Parker sought to enforce in New York a final judgment obtained in Vermont against a New York resident. The action was based upon defendant's alienation of plaintiff's husband, a cause of action abolished in New York as against public policy. In applying full faith to the foreign judgment, the majority held that defendant could not reopen the litigation and relitigate a cause of action barred by New York public policy. Thus, the

Vermont judgment sued upon was enforcible for the act relied upon did not purport to abolish actions on judgments of alienation of affection, rendered outside New York. As stated above, a notable exception to judgments entitled to full faith are those procured by fraud on the court.

The infant petitioner contended below, under such governing decisions as *Estin* v. *Estin,* 334 U. S. 541 (1948), *Williams* II (1942), *Sherrer* v. *Sherrer,* 334 U. S. 343 (1948), *May* v. *Anderson,* 345 U. S. 528 (1953) and *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416 (1957) that the full faith and credit clause was inapplicable, the jurisdictional defect of the divorce court showing on the face of the court record, as well as from the void decree fraudulently and collusively procured by his parents. Further, that to bar him before trial from establishing his legitimacy violated the due process and equal protection of laws provisions of the XIVth Amendment to the United States Constitution.

1. *The conditions requisite for giving full faith to a sister state divorce record, as specified by this court in Cook* v. *Cook, 342 U. S. 126, were not complied with by the court below.*

In *Cook* this Court laid down the precise situations where collateral attack is precluded in migratory divorce. There a second husband upset in Vermont the Florida divorce decree, obtained by the wife from her first spouse, through deceiving the Florida divorce court as to her domicil. He actively aided and abetted her in the scheme to defraud the court.

The three situations are:

> "If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (*Sherrer* v. *Sherrer,* 334 U. S. 343)

> or appeared and admitted her Florida domicile (*Coe* v. *Coe*, 334 U. S. 378)
>
> or was personally served in the divorce state (*Johnson* v. *Muelberger*, 340 U. S. 581, 587) he would be barred from attacking the decree collaterally, • • • "

Here the defendant spouse did not contest the issue of Mrs. Goldsmith's domicile, did not admit it, nor was he personally served in Georgia. Thus, the conditions for preclusion prescribed by *Cook* do not exist.

More than the "form of divorce gone through", inveighed against by Mr. Justice Frankfurter, the deception of the Georgia Superior Court consisted of two things: (1) The designed omission of any allegation or any evidence of the divorcing applicant's residence for six months, resulting in no finding in the purported decree, or elsewhere, of that jurisdictional issue, and (2) the assumed appearance *pro se* of the defendant husband was placed under the printed legal back of a Georgia attorney without formal substitution or notice of appearance or authority to represent the absent spouse. By the latter device the Superior Court was doubtless led to believe the proceedings were not "consensual" (R. 37, 38 (petition); 41-42 (appearance); 43-44 (answer); 45 (Mixon legal back); 47-48 (deposition); 51 decree of divorce).

In *Muelberger* domicile was put in issue but not contested on the trial. In *Sherrer* domicile was denied and admitted in *Coe*. While collusion may have occurred between the parties in both cases, no such claim of palpable fraud on the court was mads as is advanced here. Neither Mr. nor Mrs. Goldsmith ever attended any "hearing" at Augusta, Georgia. Moreover, *Cook* was remanded and a

presumption of validity of the Florida decree indulged in the total absence of any divorce court record in evidence.

It is already noted that the Georgia Superior Court record, supplied by respondent is defective, not exemplified or certified in accordance with U. S. Code, Title 28, Section 1738 (62 Stat. Section 947) (R. 52). In this patently feigned divorce action the record shows no pleading, evidence, admission, finding or judgment on the domicile of Mrs. Goldsmith. Unlike *Muelberger, Sherrer* and *Coe* no opportunity was given to either party to show true domicile. If respondent's purported *pro se* appearance dropped out because of Attorney Mixon's form of appearance, filed presumably on behalf of respondent, the assumption of the Appellate Division of "voluntary submission" by the parties to the divorcing court is unwarranted.

By dismissal before trial and without affording petitioner any chance to prove paternity, an issue denied *in extenso* by respondent's affidavits, procedural due process was withheld.

> *May* v. *Anderson,* 345 U. S. 528 (1953);
> *Griffin* v. *Griffin,* 327 U. S. 220, 229 (1946);
> *Urquhart* v. *Urquhart,* 196 Misc. 664, affd. 277 App. Div. 752 (1949).

After trial in *Urquhart* the New York Supreme Court (Hofstadter, J.) passed upon the procedural question of proof of paternity. Plaintiff was in the identical situation of petitioner, viz., born after a void foreign divorce procured by fraud on the court, both parties being domiciliaries of New York:

> "He (infant plaintiff) asserts not alone that John is his father but that the Arkansas divorce is void for want of jurisdiction * * * and that, *as to him, at*

least, John and Vivien are still husband and wife and that he is, consequently, their lawful son.

We thus face at the threshold the question whether John is, in fact, the plaintiff's father. For, were it found that he is not, there would be no occasion to pass on the validity of the divorce.'' (Italics ours) (92 N. Y. S. 2d 484, 489).

Noteworthy, too, is the ruling in *Urquhart,* affirmed by the Appellate Division, that defendant's special appearance, protesting service by publication on him in Maryland, did not constitute "voluntary submission" to the New York courts. Such personal jurisdiction did not curtail jurisdiction over the *res,* viz., plaintiff's relationship or *status* as between him and both parents in New York (92 N. Y. S. 2d at 488). Here we are concerned with the reverse situation where jurisdiction *in rem* was wholly absent and an unfounded recital of personal jurisdiction only set forth in the foreign court record. That such a connived "appearance" should constitute "voluntary submission" is unthinkable.

In any case the purely personal right of *status* is involved in the case at bar, as in *Urquhart.* That case, declaring plaintiff to be the legitimate son of defendants, did not disturb the subsequent remarriage of the plaintiff's father. For that reason it may be considered a precursor to the divisible divorce concept first pronounced in *Estin* v. *Estin,* 334 U. S. 541 (1949).

Estin, Vanderbilt and *Simons* v. *Miami Beach First National Bank,* 381 U. S. 81 (1965) deal with alimony and dower or estate interests, as does *Muelberger.* The question in each was whether property rights, vested or future, were cut off by divorce decrees rendered in actions in which the claimants did not participate. But no property rights

as such were involved in *May* or in the case at bar. In the instant case in Georgia, total or absolute divorce was decreed without any request or award of alimony, support or custody. Likewise, in *May* the wife's personal right in Ohio to custody of children was deemed a right not within the force of an *ex parte* decree of Wisconsin. No mandate of full faith was imposed.

Urquhart also involved an infant's *status* as distinct from claims to property. It has been said that considerations of this Court in *Muelberger* on the advancement of the daughter's financial claims, viz.; sharing in her father's estate "hardly apply when the establishment of the invalidity of a foreign divorce would ensure the legitimacy of a child".

Ehrenzweig, Conflict of Laws, 253, 254 (1962).

As a matter of fact, since petitioner asks that the Georgia decree be declared void only as between himself and his parents, but not as between themselves, the situation is no different, under full faith requirements, than that of *Estin.*

Full faith and credit is not accorded by the courts in Georgia to a sister state decree of divorce where evidence *dehors* the divorce case record shows that such foreign decree is a nullity for want of jurisdiction. The void judgment, even though no jurisdictional defect appears on its face, may be collaterally attacked in any court by a third person who is materially and adversely affected by such decree.

Cole v. *Cole*, 221 Ga. 171, 143 S. E. 2d 637 (decided July 12, 1965).

Mrs. Cole sued for total divorce in Georgia. Defendant, her second husband, filed no defensive pleadings. She

had been divorced by her first husband in Alabama on a petition filed by him. At an interlocutory hearing for temporary alimony and counsel fees in the Georgia divorce case an exemplified copy of the Alabama decree was received in evidence. That record showed that her first husband had alleged that both he and his wife resided in Alabama at commencement of suit. Mrs. Cole responded thereto and admitted the jurisdictional allegations.

But, on the interlocutory hearing, Mrs. Cole testified that neither she nor her former husband had ever lived in Alabama, that he was alive and resided in Port Chester, New York and that no other divorce was granted to her or the first husband. On this extrinsic evidence the suit was dismissed on motion of the second husband.

In affirming dismissal the Supreme Court of Georgia, per Chandler, P. J., said as to the full faith and credit requirement:

> "but where as here the evidence of one relying upon a foreign decree conclusively shows that such decree is a nullity, the courts of this State are not required to give it full faith and credit and a person not a party to such divorce proceeding whose rights are materially and adversely affected by it may collaterally attack its validity in the courts of this State. *Durden* v. *Durden,* 184 Ga. 421 (191 S. E. 455); *Christopher* v. *Christopher,* 198 Ga. 361 (2a) (31 S. E. 2d 818); *De Bouchel* v. *Candler,* 296 F. 482.
>
> "Here the positive evidence of Mrs. Cole shows that a fraud was practiced by her and her former husband on the Alabama Court which purportedly divorced them; * * * ".

Cole, it is submitted, flatly applies Section 110-709 of the Georgia Code permitting collateral attack on the void judg-

ment of a court having no jurisdiction over the subject matter by a non-party thereto, who is materially and adversely affected, as is petitioner. The fact that personal jurisdiction was obtained over the wife and first husband in the divorce action is not material, absent subject matter jurisdiction.

2. *Refusal of the court below to declare petitioner's status as a legitimate citizen of the State of New York is arbitrary and discriminatory action in violation of Article IV, Sections 1 and 2, and of the XIVth Amendment to the United States Constitution.*

Laying to one side the challenges to validity of foreign divorce, such as in *Sherrer* and *Coe,* which were between disgruntled spouses, the attack reaching this Court in *Muelberger* was launched by a "stranger" to the decree. Petitioner perforce, not being *in esse* at the time of divorce, was no party thereto.

But petitioner's *standing* to attack his parents' fraudulent divorce is no different from that of the "*wives*" in *Vanderbilt, Simons* and *May,* none of whom had established a claim to property interests at the time of divorce. In *May* v. *Anderson* the Court extended *Estin* to child custody; Ohio was not required to give constitutional respect to a Wisconsin *ex parte* award of custody to the father, saying:

> "a mother's right to custody * * * is a personal right entitled to at least as much protection as her right to alimony" (345 U. S. 528, 534).

Similarly, in *Vanderbilt* full faith was not obligatory, so as to preclude Mrs. Vanderbilt from support in New York, even though her statutory right to support had not been reduced to judgment before her husband got his *ex parte* Nevada divorce.

The impact of *Simons* v. *Miami Beach First National Bank* (381 U. S. 81), decided in 1965, is exhaustively discussed and disapproved of by Professor David P. Currie in Suitcase Divorce in the Conflict of Laws (U. Chi. L. R., Vol. 34, No. 1, 1966, p. 26). A distinguishing feature, from the case at bar, was that Mrs. Simons attempted to secure dower rights in and under the law of the divorcing state, Florida:

> "The Court certainly did not say that New York would have been powerless to grant the widow a statutory share, had it chosen to do so * * *" (Currie, *supra*, p. 43).

On the other hand petitioner seeks declaratory relief in his home (forum) state, not in the divorcing state of Georgia with which neither he nor his parents ever had more than ephemeral contacts.

The reason or sense in applying mechanically the rule of *Muelberger* in this case does not appear. The court below said that the divorcing parent-parties are foreclosed from collateral attack, which is clearly right. But to apply the same rule to petitioner, seeking no property benefit from a declaration of his status, nor attempting to upset the marital *status* of the parties, is wrong. Not being in privity of estate, as was the daughter in *Muelberger*, in no true sense does he "claim through" the parties to the fraudulent divorce. And as stated in *Kerr* v. *Kerr* (41 N. Y. 272): "Want of jurisdiction is a matter which always may be interposed against a judgment * * * when any benefit is claimed for it". Positively, petitioner claims no benefit from the purported divorce decree; rather is it that respondent should not benefit from his own wrongful fraudulent action.

Naturally the point will be made that *Kerr* was decided in post Civil War days. So we look at the current decisions in New York. When we do we find confusion.

Following *Rosenstiel* v. *Rosenstiel,* 16 N. Y. 2d 64, 209 N. E. 2d 709 (1965), New York law is fluctuating rapidly on its policy and the interest in the State of its citizens. There the majority stated that a bilateral Mexican divorce offends "no public policy of this state". True, then there was but one ground for divorce in New York. A state of Chihuahua divorce, granted on less than one day's residence, may be as synthetic as the divorce case at bar. Both were consensual. But both the public policy of the States of Georgia and New York prohibit consensual divorce in 1967 as they did in 1869.

In *Dicks* v. *Dicks,* 177 Ga. 379, 382, the Supreme Court of Georgia flatly declared that for total divorce "Jurisdiction of the subject matter cannot be conferred by consent" on the mere submission of the parties.

> "One filing a petition for divorce must *allege* and *prove* that he has been a bona fide resident of the state for the length of time required by law. The *burden of proof is upon the applicant*" (Italics ours) (177 Ga. 379, 382).

Clearly, the New York courts may not extend into this State, and declare the law of a foreign state, with respect to New York citizens, to be either more or less than that already laid down by the highest court of the rendering sister state. New York courts are powerless in applying foreign law to dispense with proper plea, proof, and finding of jurisdictional domicil.

In *Rosenstiel* the New York Court of Appeals chose to nullify New York statutes without pretense of constitutional compulsion.

Currie, Suitcase Divorce, 34 U. Chi. L. R. 57.

We have seen that the Supreme Court of Georgia accords no recognition to a foreign decree of divorce, shown, by extrinsic evidence to be a nullity, when attacked by a person not a party thereto and a stranger whose personal rights are affected, *Cole* v. *Cole,* 221 Ga. 171, 143 S. E. 2d 637 (1965).

New York, on the contrary, follows mechanically the trend toward non-recognition of foreign divorces set out in Muelberger sixteen years ago. A recent pronouncement is that of *Magowan* v. *Magowan,* 19 N. Y. 2d 296 revg. 24 A. D. 2d 840 (Apr. 6, 1967). The husband, a stranger to the wife's prior divorce decree, defended on the ground that it was void jurisdictionally. Reversing the Appellate Division and citing the instant case as authority, the Court of Appeals stated that full faith and credit must be accorded to the wife's Alabama decree because

> "it is not clear, under Alabama law, whether the defendant being a stranger to that decree, has standing to attack it."

Accordingly, Mr. Magowan was relegated to Alabama courts for relief, if any.

Similarly, petitioner in effect has been relegated for relief to the State of Georgia.

This harsh ruling consigns petitioner to life-time bastardy, without a trial on the merits. Negro children in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), received

no such treatment concerning the psychological effect of "separate but equal" education:

> "To separate them • • • generates a feeling of inferiority as to their status, in the community • • • in a way unlikely ever to be undone." (347 U. S. at 494.)

While the majority of the New York Court of Appeals held recognition of the *Rosenstiel* bilateral Mexican divorce, as a matter of comity, did not offend the public policy of the State of New York, Chief Judge Desmond and Judge Scillepi strongly dissented on that point. Both judges cited *Caldwell* v. *Caldwell*, 298 N. Y. 146, 81 N. E. 2d 60 (1948), holding Mexican divorces obtained without personal appearance before the court, as in the case at bar, were forbidden by New York public policy prohibiting contracts to divorce (now General Obligations law). (Section 5-311, formerly Section 51, Domestic Relations Law).

The difference of opinion has been resolved, however, by the New York legislature shortly after *Rosenstiel* by liberalizing grounds for divorce (N. Y. Dom. Rel. Law, Section 170). The statutes are effective in part September 1st, 1966 and September 1st, 1967. One of the latter provides a test for proof of New York domicile in migratory divorce, indicating that domicile of one party outside New York is required in 1967 as its public policy (N. Y. Dom. Rel. Law, Section 250):

> "*Divorces obtained outside the State of New York.* Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within 12 months prior to the commencement of the proceeding therefor, and resumed residence in this state within 18 months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return

maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

The provisions of this section shall not apply to a divorce obtained in another jurisdiction prior to September first, nineteen hundred sixty seven."

If the argument of Professor Currie is right that consensual divorces currently offend New York policy (U. Chi. L. R., vol. 34, 62-64), it follows that the court below has openly disregarded the declared public policy of both states, New York and Georgia. The decision reached violates, we submit, both the fundamental fairness doctrine of due process and constitutes unequal enforcement of laws against petitioner.

The interest of the State of New York is as compelling, petitioner being a ward of the court, as that expressed in *Estin*. Certainly Georgia has and could have no interest or concern in the *status* of petitioner in the domiciliary state of himself and family. New York's interest in the support of wives domiciled there is clearly shown in *Estin*. To relegate the infant petitioner to Georgia, with which no substantial contacts exist or ever existed is to deny justice to him.

The court below was in the position, though not acknowledged by it, of *parens patriae* to the infant petitioner. Recently, this Court has enforced the Fourteenth Amendment guarantees in *parens patriae* proceedings involving juveniles (*In re Gault*, U. S. Law Week, Vol. 35, 4399, 4403).

The position of the court as a "wise, affectionate and careful parent", acting for the protection of the property interests and person of a child, is quaint but inadequate.

Conditions of the Twentieth Century are urban, industrial and mobile. It presents a far cry from conditions prevailing in Eighteenth Century England (*Queen* v. *Gyngall*, 1893, 2 Q. B. Div. 232, 238). Its use, or rather tacit misuse, below has operated to the disadvantage of petitioner's person and to the detriment of his constitutional rights.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Clifton F. Weidlich,
Attorney for Petitioner,
55 Liberty Street,
New York, N. Y. 10005.

APPENDIX A

Order of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 15th day of February, 1966.

Present—Hon. CHARLES D. BREITEL,
Justice Presiding
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices

9792

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,
Plaintiff-Respondent,

vs.

STUART M. GOLDSMITH,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 30th day of March, 1965, denying defendant's motion to dismiss the complaint, and said appeal having been argued by Mr. Gerald I. Lustig of counsel for the appellant, and by Mr. Clifton

F. Weidlich of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, with $50 costs and disbursements to the appellant, and defendant's motion to dismiss the complaint granted, with $10 costs, and the Clerk is directed to enter judgment in favor of the defendant dismissing the complaint, with costs.

Enter:

HYMAN W. GAMSO
Clerk.

Filed Feb. 15, 1966

APPENDIX B

Opinion of Appellate Division, First Department

Before BREITEL, J. P. and MCNALLY, STEVENS, EAGER and STEUER, JJ.

PER CURIAM.

Order, entered March 30, 1965, unanimously reversed, on the law, with $50 costs and disbursements to the defendant, and motion of the defendant-appellant to dismiss the complaint granted, with $10 costs. The complaint does not show the existence of a bona fide justiciable controversy. Absent such showing, the court should not take jurisdiction of the action. (See Red Robin Stores v. Rose, 274 App. Div. 462, 84 N.Y.S.2d 685; Robert E. Tompkins, Inc. v. Security Trust Co., 277 App.Div. 1090, 101 N.Y.S. 2d 311; Strauss v. University of State of New York, 282 App.Div. 593, 125 N.Y.S.2d 821.) The plaintiff alleges that he is the natural child of the defendants, born approximately two years after they were divorced by decree of the Georgia Superior Court, and he prays for judgment declaring that the decree is invalid and that he is the lawful child of the defendants. The documentary evidence submitted on this motion, however, establishes that the Georgia decree is immune from collateral attack. It appears that the defendants, then husband and wife, voluntarily submitted to the jurisdiction of the Georgia Superior Court, Richmond County, and that the decree of divorce rendered by such court on May 27, 1952, recites "that the Court has jurisdiction of the parties to this libel for divorce". While the record of the proceedings and the decree of the Georgia Superior Court contain no statement showing a residence of either party in the State

of Georgia, except an unverified recital in the petition of the petitioner's residence in Richmond County, Georgia, there is no requirement under Georgia law that the petitioner's residence be pleaded or established in any particular form. In any event, a lack of residential requirements does not affirmatively appear on the record. In the absence of a jurisdictional defect appearing on the face of the record, the divorce decree is conclusively binding on the parties who voluntarily submitted to the jurisdiction of the court and upon all persons claiming through them. The decree would not be subject to collateral attack in Georgia. (See Phillips v. Phillips, 15 Misc.2d 884, 180 N.Y.S.2d 475, and cases cited; Kicklighter v. Kicklighter, 217 Ga. 54, 121 S.E.2d 122; Owenby v. Stancil, 190 Ga. 50(6), 58, 8 S.E.2d 7; Martocello v. Martocello, 197 Ga. 629, 631, 30 S.E.2d 108; Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443; Wash v. Dickson, 147 Ga. 540, 94 S.E. 1009, 1010, 1011; Jones v. Smith, 120 Ga. 642, 48 S.E. 134.) Since it is not subject to collateral attack in Georgia, the rendering state, the decree is entitled to full faith and credit here and it may not be attacked in this action brought here. (See Johnson v. Muelberger, 340 U.S. 581, 71 S.Ct. 474, 478, 95 L.Ed. 552; Boxer v. Boxer, 12 Misc. 2d 205, 177 N.Y.S.2d 85, affd. 7 A.D.2d 1001, 184 N.Y.S.2d 303, affd. 7 N.Y.2d 781, 194 N.Y.S.2d 47, 163 N.E.2d 149; Klarish v. Klarish, 19 A.D.2d 170, 241 N.Y.S.2d 179, affd. 14 N.Y.2d 662, 249 N.Y.S.2d 869, 198 N.E.2d 902; Cavallo v. Cavallo, 45 Misc.2d 467, 257 N.Y.S.2d 186.) Finally, inasmuch as the validity of defendants' said divorce may not be questioned, this action will not lie to resolve an alleged issue of paternity. (Anonymous v. Anonymous (n. o. r.), 17 Misc. 2d 187, 184 N.Y.S.2d 219) The decision of Urquhart v. Urquhart, 185 Misc. 915, 57 N.Y.S.2d 734,

affd. 270 App.Div. 759, 59 N.Y.S.2d 921, 188 Misc. 613, 66 N.Y.S.2d 472, affd. 272 App.Div. 60, 69 N.Y.S.2d 57, affd. 297 N.Y. 689, 77 N.E.2d 1; 196 Misc. 664, 92 N.Y.S.2d 484, affd. 277 App.Div. 752, 97 N.Y.S.2d 200 is not controlling. There, it was held that the foreign decree of divorce was subject to collateral attack and, on such basis, the plaintiff sought and was entitled to a declaration of the relationship of legitimate parentage. Here, however, in light of Johnson v. Muelberger (supra), decided by the United States Supreme Court subsequent to the *Urquhart* decision, and in view of the other authorities cited supra, we have concluded that the Georgia decree is not subject to attack here and certainly, there is no justification for the maintenance of this action for a determination of paternity where the plaintiff may not succeed in his claim of legitimate parentage.

APPENDIX C

Amended Remittitur

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-third day of May A. D. 1967.

Present, HON. STANLEY H. FULD, Chief Judge, presiding.

1 Mo. No. 512

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,

Appellant,

VS.

STUART M. GOLDSMITH,

Respondent,

AND

FLORENCE D. GOLDSMITH,

Defendant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions involving the construction of the Constitution of the United States, viz.: Plaintiff contended that defendant's divorce decree procured in Georgia was entitled, as against him, to no protection under the full faith and credit clause of such Constitution and that the judgment dismissing the complaint deprives plaintiff of liberty without due process of law and of the equal protection of the laws contrary to the Fourteenth Amendment thereto. The Court of Appeals held that there was no violation of plaintiff's rights under the Constitution of the United States.

AND the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

Appendix C

COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of February in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

Witness,

The Hon. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR February 28, 1967.

1. No. 283. 66

PATRICK D. GOLDSMITH, by EDWARD S. BLACKSTONE, his Guardian ad Litem,

Appellant,

VS.

STUART M. GOLDSMITH,

Respondent,

AND

FLORENCE D. GOLDSMITH,

Defendant.

BE IT REMEMBERED, That on the 10th day of June in the year of our Lord one thousand nine hundred and sixty-six, Patrick D. Goldsmith, by Edward S. Blackstone, his Guardian ad Litem, the appellant—in this cause, came here unto the Court of Appeals, by Weidlich & Rogers, his

attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Stuart M. Goldsmith, the respondent—in said cause, afterwards appeared in said Court of Appeals by Glazer & Pollack, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Clifton F. Weidlich, of counsel for the appellant, and by Mr. Gerald I. Lustig, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of
of the State of New York.

APPENDIX D

Statutes Involved

United States Constitution, Article IV

Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Record, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Title 28, §1738 U. S. C.

The records and judicial proceedings of any court of any such State . . ., or copies thereof, shall be proved or admitted in other courts within the United States . . . by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.

United States Constitution, Amendment XIV

§1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix D

N. Y. Civil Practice Law and Rules

3211(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on ground that:

1. a defense is founded upon documentary evidence; or

7. the pleading fails to state a cause of action.

N. Y. General Obligations Law

§5-311. Certain agreements between husband and wife void. A husband and wife cannot contract to alter or dissolve the marriage. . . .

Georgia Statutes, Code of Georgia, 1933, as Amended

§110-701:

A void judgment may be attacked in any court and by any person. In all other cases judgments may not be impeached collaterally, but must be set aside by the court rendering them.

§110-709:

The judgment of a court having no jurisdiction of the person or subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it.

§110-706:

Any judgment, verdict, rule or order of court, which may have been obtained or entered up, shall be set aside and be of no effect, if it shall appear that the same was entered up in consequence of corrupt and wilful perjury;

and it shall be the duty of the court in which such verdict, judgment, rule, or order was obtained or entered up to cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said court to do so, unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict, judgment, rule, or order could not have been obtained and entered up without the evidence of such perjured person, saving always to third persons innocent of such perjury, the rights which they may lawfully have acquired under such verdict, judgment, rule, or order before the same shall have been actually vacated and set aside.

§30-107:

No court shall grant a divorce of any character to any person who has not been a bona fide resident of the State six months before the filing of the application for divorce.